

General Information Letter: Illinois follows IRC Section 338(h)(10) treatment without a separate election.

May 2, 2001

Dear:

This is in response to your letter dated April 16, 2001. The nature of your letter and the information provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), which may be viewed on our website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Your letter states as follows:

The Connecticut Department of Revenue is currently undertaking a review of its policy regarding the treatment of gain from the deemed sale of assets pursuant to the election available under Internal Revenue Code Section 338(h)(10). In this connection, we would be most appreciative if your Department could respond to the following survey:

- (1) Does your state conform to the federal treatment of an IRC Section 338(h)(10) election and follow the federal rules?
- (2) Must a separate state election be made?
- (3) Assuming your state permits an IRC Section 338(h)(10) election, is the gain from the deemed sale of assets treated as apportionable business income?
- (4) Are the gross proceeds for the deemed sale included in the numerator and denominator of the target subsidiary's sales factor?
- (5) If "no", is the net gain from the deemed sale included in the sales factor instead?
- (6) If both (4) and (5) are "no", please briefly describe the legal and/or statutory basis for this exclusion from the sales factor.
- (7) How does your state require the gain and short-period income to be apportioned?
  - (a) Based on apportionment factors for the short-period?
  - (b) Based on the prior year's apportionment factors?
  - (c) Other method?

## **RULING**

With respect to your question (1), Illinois does conform to the federal treatment and rules attending an IRC section 338(h)(10) election.

With respect to your question (2), a separate Illinois election is not made.

With respect to your question (3), gain from the deemed sale will be apportionable business income if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's trade or business operations. See 35 ILCS 5/1501(a)(1).

With respect to your questions (4), (5) and (6), gross receipts from the deemed sale generally will be included in the numerator (to the extent attributable to Illinois) and denominator of the sales factor, provided that gain from the sale constitutes business income. See 86 Ill. Adm. Code 100.3370.

However, Illinois Department of Revenue Regulations section 100.3380(b) contains special rules excluding certain gross receipts from the sales factor that may be applicable in the context of a §338 deemed asset sale. (86 Ill. Adm. Code 100.3380(b)) For example, where substantial amounts of gross receipts arise from an incidental or occasional sale of assets used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. (86 Ill. Adm. Code 100.3380(b)(2)) In addition, in the case of sales of business intangibles, gross receipts are disregarded. Instead, only the net gain (loss) from such sales must be included in the sales factor. (86 Ill. Adm. Code 100.3380(b)(6))

With respect to your question (7), generally the deemed sale gain and short-period income is apportioned based on factors for the short period.

As stated above, this is a GIL. Accordingly, it does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you have further questions concerning this GIL, you may contact Legal Services Division at (217) 782-7055. If you have further questions related to the Illinois income tax laws, visit our website at [www.revenue.state.il.us](http://www.revenue.state.il.us) or contact the Department's Taxpayer Information Division at (217) 782-3336.

Sincerely,

Brian L. Stocker  
Staff Attorney – Income Tax